Petitioner errs in contending that the convenience test was meant only to avoid fraud and subterfuge by telecommuters working at home on weekends or evenings and alleging that this purpose does not apply to him. Although prevention of fraud and manipulation of the days-worked formula is one benefit of the convenience test, the Court of Appeals correctly recognized that the convenience test effectively distinguishes between true New York source income and income whose source is another jurisdiction. The test and its application to petitioner thus satisfy the requirements of the Equal Protection Clause established by this Court. *See Nordlinger v. Hahn*, 505 U.S. 1, 10-12 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THOMAS J. HUCKABY,

Petitioner,

v.

NEW YORK STATE DIVISION OF TAX APPEALS, TAX APPEALS TRIBUNAL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of New York

REPLY BRIEF TO BRIEF IN OPPOSITION

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RESPONSE TO POINTS RAISED IN BRIEF IN OPPOSITION

I. RESPONDENTS' CONTENTION THAT THIS CASE MERELY INVOLVES A MISAPPLICATION OF A PROPERLY STATED RULE OF LAW IS FUNDAMENTALLY FLAWED

Supreme Court Rule 10 provides that in considering a petition for a writ of certiorari this Court will consider whether "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." That is exactly what has happened in this case.

The Court of Appeals of the State of New York has held that the requirement of the Due Process Clause of the United States Constitution that a state can tax a nonresident only on income derived from in-state sources is satisfied by reason of the presence of the nonresident's employer in the state, thereby justifying taxing Petitioner on 100% of his income, only 25% of which was earned in the state. This is not a "misapplication of a properly stated rule of law" within the meaning of Rule 10, as Respondents suggest. Rather it is a new rule of law for which Respondents can cite no authorities in support, either of this Court or of any other court.

The holding of the Court of Appeals is contrary to the holdings of this Court in *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1979), and *Shaffer v. Carter*, 252 U.S. 37 (1920), for the reasons stated in the petition.

The federal constitutional issue is important and should be settled by this Court.

II. THE ISSUE PRESENTED IS ONE OF NATIONWIDE IMPORTANCE AND IS NOT UNIQUE TO NEW YORK

In contending that the issue presented is not of nationwide importance, Respondents incorrectly state that only New York has the convenience of the employer rule. In fact, Nebraska and Pennsylvania do as well. Neb. Admin. Code section 316-22-003.01C(1). 61 Pa. Code section 109.8. Moreover, in view of the nationwide publicity given to the decision of the Court of Appeals in this case (newspapers around the Country published articles about the decision), other states are likely to follow suit if New York's rule is upheld.

More importantly, given the nature of telecommuting, individuals around the Country can telecommute to any employer. In this case, Petitioner lived in Tennessee, almost 1,000 miles from New York. Given New York's position as a center of commerce, people around the Country are likely to be telecommuting to New York. The Court of Appeals' decision affects individuals in every state of the Union.

III. A NONRESIDENT'S MOTIVES FOR WORKING OUT-OF-STATE CANNOT JUSTIFY TAXING THE RESULTING INCOME

Respondents claim that a nonresident's income derived from working outside the taxing state can be taxed by the state if the person chooses voluntarily to work outside the state and not under compulsion by his or her employer. Respondents cite no case law in support of this extraordinary proposition.

The Due Process Clause permits a nonresident to be taxed only on income earned in the taxing state. His or her reasons for working outside the state are immaterial.

United States citizens are free to live and work wherever they choose. Under this Court's decision in *Shaffer v. Carter*, 252 U.S. 37 (1920), a person who lives in one state can be taxed by another state only on income derived from sources in the taxing state. Respondents have cited no cases holding that this requirement is met merely because the nonresident's employer is located in the taxing state. Neither has the Court of Appeals. If it could be, then a resident of Tennessee, like Petitioner, could be taxed by New York on all of his income even if he never set foot in New York. Respondents contend (Brief in Opposition, p. 7, fn.1) that New York State has the constitutional power to tax a person on compensation from a New York employer even if that person never enters the State. Under this view, a federal tax specialist working for a New York-based Big-4 accounting firm, serving the firm's nationwide clients by telephone and the Internet, who worked in the firm's Los Angeles office because he preferred to live in Los Angeles rather than New York and not because he was required to work in Los Angeles by his firm, could be taxed by New York on all of his income. This view, if allowed to stand by this Court, could have devastating consequences for multistate companies and their employees. Thus, the question presented has great significance in this new age of cyberspace and should be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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